

**COURT OF APPEALS OF INDIANA
ORAL ARGUMENT AT A GLANCE
VINCENNES UNIVERSITY
SHIRCLIFF AUDITORIUM**



P.R. Mallory et al. v. American Casualty Co. et al.

Appeal from:
Montgomery Circuit Court,
The Honorable
Thomas K. Milligan, Judge

Oral Argument:
Thursday, October 29, 2009
11:00 a.m.
20 minutes each side

CIVIL LAW ISSUE

Radio Materials Corporation was insured by Continental Casualty Company and American Casualty Company of Reading, PA, in the early 1980s. Radio Materials Corporation and its successors sued their insurers for coverage of claims related to environmental contamination. Continental Casualty Company and American Casualty Company of Reading, PA, moved for summary judgment on the basis that Radio Materials Corporation did not provide them with adequate notice under the insurance policies. The trial court granted their motion. This court will hear arguments regarding whether the trial court properly granted summary judgment.

CASE SYNOPSIS

Facts and Procedural History

Radio Materials Corporation, an Illinois corporation, was founded in 1947 in Chicago, Illinois, to manufacture picture tubes and ceramic capacitors for the television industry. In 1948, Radio Materials Corporation opened a plant in Attica, Indiana. In 1957, P.R. Mallory & Company Inc. purchased the stock of Radio Materials Corporation. In 1978, P. R. Mallory & Co. Inc. sold its assets to Radio Materials Corporation, a Nevada corporation. At some point, Kraft Foods Corporation became the successor to the P. R. Mallory Company. At some point, Kraft Foods Global, Inc., and Dart & Kraft Inc. became involved.

From approximately 1950 to 1963, wastes from the manufacturing process were disposed in an open unlined pit located at the Attica site. From 1963 to 1980, Radio Materials Corporation operated another open unlined waste disposal pit and disposed of additional wastes.

In May 1969, the Indiana State Board of Health sent a letter to the general manager of Radio Materials Company, which stated that an inspection at the Attica facility revealed that overflow from a pit contained Barium Titanate and that the material was later settling in a roadside ditch. In 1972, the Indiana State Board of Health sent another letter to Radio Materials Company stating that buckets containing

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fuel oil were leaking which resulted in pollution of a creek.

Continental Casualty Company ("CCC") issued a commercial casualty policy to Radio Materials Corporation with a policy period from December 29, 1980 to December 29, 1981. American Casualty Company of Reading, PA, ("ACC") issued three commercial casualty policies to Radio Materials Corporation, which covered the period from December 29, 1981 to December 29, 1984. The policies provided coverage for amounts the insured became obligated to pay because of bodily injury or property damage. Each of the four policies contained the following notice provision:

In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

The policies defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

On August 14, 1980, Radio Materials Corporation notified the United States Environmental Protection Agency (the "EPA") of its hazardous waste activity and identified itself as a generator of hazardous waste and an owner/operator of a treatment, storage, and/or disposal facility for

hazardous waste. In 1986, Radio Materials Corporation completed a Certification Regarding Potential Releases from Solid Waste Management Units. The certification revealed that pits at the Attica site contained waste products of ceramic capacitor manufacturing processes.

From 1981 to 1990, Radio Materials Corporation operated an outdoor drum storage area in which wastes were stored in fifty-five gallon drums, which were placed on the bare ground, prior to being shipped off-site for disposal. Spills of waste material were reported in 1986 and 1989.

In 1989, the board of directors of Radio Materials Corporation held a meeting, and the minutes for the meeting reveal that Dart & Kraft should be notified of their potential liability for clean up of hazardous wastes generated and buried underground during previous years. That same year, the president of Radio Materials Corporation sent a letter to the general counsel of Kraft Foods Corporation which stated that "potential environmental pollution problems exist at the plant site in Attica, Indiana."

In 1992, the president of Radio Materials Corporation sent a letter to a third party which stated that there were documented spills and releases.

A 1995 report prepared for Radio Materials Corporation indicated that one of the subsurface soil samples "EXCEED[ED] the residential and the non-residential health-based risk criteria or goals for cleanup," and that a water sample "EXCEED[ED] the health-based risk criteria for two compounds, trichloroethene and tetrachloroethene." The report recommended that "the source or 'hotspot,' . . . be removed and that the effect of its removal be evaluated by subsequent monitoring of the condition of water" The report also

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stated that the “apparent depth of the ‘hotspot,’ was “a depth of 20 to 25 feet.” The report also stated that “a minimum excavation is approximately sixty feet in diameter and twenty five feet deep.”

Between November 1995 and February 1996, Radio Materials Corporation initiated an excavation project to remove the majority of the contaminated soil. An expert report stated that “[t]he voluntary cleanup of SWMU 5 in 1995/96 was conducted improperly; it knowingly left contamination behind, and it may have accelerated, rather than reduced releases of chlorinated solvents to groundwater.”

In 1997, the Indiana Engineering & Geological Services sent Radio Materials Corporation a letter indicating that samples showed tetrachloroethene above the certain levels. In March 1999, the EPA entered a consent order for Radio Materials Corporation in which the EPA found that there had been a release of hazardous waste into the environment at the Attica facility and Radio Materials agreed to undertake all actions required by the consent order.

In August 2000, P.R. Mallory & Company, Inc., including Radio Materials Corporation, Kraft Foods Global, Inc., and Dart & Kraft Inc. (collectively, the “Plaintiffs”) filed a complaint against CCC and numerous other insurance companies including “DOE INSURANCE COMPANIES 1-300” for breach of contract or anticipatory breach of contract and declaratory judgment. The complaint referenced a number of policies but did not reference the policy which CCC issued to Radio Materials Corporation with a policy period from December 29, 1980 to December 29, 1981, which is one of the policies at issue in this case.

In January 2002, Kraft Foods North America and a number of insurance companies, including ACC and CCC, entered into a

confidential settlement agreement and release. The settlement agreement and release did not include the claims at issue in this case.

On December 8, 2004, the Plaintiffs filed a third amended complaint for declaratory judgment and breach of contract against ACC, CCC, and “DOE INSURANCE COMPANIES 1-10.” Plaintiffs pointed to the three policies issued by ACC to Radio Materials Corporation and one policy issued by CCC to Radio Materials Corporation and sought a declaration that the defendants were obligated to pay the costs and expenses of investigation and defense.

ACC and CCC filed a motion for summary judgment and argued that the Plaintiffs were precluded from relief because they failed to provide ACC and CCC timely notice. ACC and CCC also filed a second motion for summary judgment and partial summary judgment, which requested an entry of summary judgment for other reasons.

On July 17, 2008, the trial court issued an order denying ACC and CCC’s second motion for summary judgment and partial summary judgment. The trial court’s order stated that there were some issues that were to be determined by the trier of fact. That same day, the trial court issued an order granting ACC and CCC’s motion for summary judgment based on late notice.

On August 18, 2008, the Plaintiffs filed a motion for reconsideration of the trial court’s July 17, 2008 order granting ACC and CCC’s motion for summary judgment on late notice. On September 2, 2008, ACC and CCC filed a motion for summary denial and/or to strike Plaintiffs’ motion for reconsideration and Plaintiffs’ motion for clarification. On November 14, 2008, the trial court entered an order granting ACC and CCC’s motion for summary denial of

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Plaintiffs' motion for reconsideration and motion for clarification. The trial court stated that the July 17, 2008 order was a final judgment.

The Plaintiffs raise four issues, which we consolidate and restate as whether the trial court erred by granting ACC and CCC's motion for summary judgment. ACC and CCC argue that Mallory's appeal is untimely and should be dismissed.

Parties' Arguments

I. Whether the Plaintiffs' Appeal is Untimely

The first issue is whether the Plaintiffs' appeal is untimely and should be dismissed. Initially, ACC and CCC argue that the Plaintiffs have waived any challenge to the trial court's finding that the July order was a final judgment because ACC and CCC did not raise the issue in their initial brief. Generally, grounds for error may be framed only in an appellant's initial brief, and if addressed for the first time in the reply brief, they are waived.

ACC and CCC also argue that, even if Plaintiffs did not waive challenging the trial court's finding that the July order was a final judgment, the July order was a final judgment and the Plaintiffs failed to timely appeal. Generally, "[a] party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment." Ind. Appellate Rule 9(A)(5) provides that "[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited" The parties disagree as to whether the July order constituted a final judgment, which is a judgment that disposes of all claims as to all parties and puts an end to a particular case.

The Plaintiffs argue that Ind. Trial Rule 54(B) governs. Ind. Trial Rule 54(B) governs when a judgment upon multiple claims or involving multiple parties consti-

tutes a final judgment. Under the rule, a trial court is required to expressly determine that there is no just reason for delay and expressly directs entry of judgment. The Plaintiffs argue that the late notice order was not a final judgment because "it did not **expressly** state that 'there was no just reason for delay' and 'direct the entry of judgment' under Trial Rule 54(B)" ACC and CCC argue that Trial Rule 54 is not applicable because "the July 17, 2008 Order granted ACC and CCC's motion for summary judgment on the threshold issue of timely notice, the Order disposed of all claims as to all parties." The Plaintiffs argue that the trial court's order granting ACC and CCC's motion for summary judgment based upon late notice was not a final judgment because the order "left numerous issues unclear and unresolved" The Plaintiffs point to the trial court's order denying ACC and CCC's omnibus motion which was entered on the same day as the trial court's order granting ACC and CCC's motion for summary judgment on late notice.

II. Summary Judgment

Summary judgment is appropriate only if there are no genuinely disputed issues of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. The trial court granted summary judgment to ACC and CCC as to the Plaintiffs' claims, and the Plaintiffs appeal that ruling. To be entitled to summary judgment, ACC and CCC are required to show that the undisputed facts reveal that the Plaintiffs failed to give notice required by the insurance policies.

Generally, notice is a threshold requirement which must be met before an insurer is even aware that a controversy or matter exists which requires the cooperation of the insured. An insurer cannot defend a claim of which it has no knowl-

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edge. The function of a notice requirement is to supply basic information to permit an insurer to defend a claim. The requirement of prompt notice gives the insurer an opportunity to make a timely and adequate investigation of all the circumstances surrounding the accident or loss.

The parties disagree as to when notice was given. The Plaintiffs argue that notice was given to ACC and CCC on August 29, 2000 when Radio Materials filed an Amended Complaint for Declaratory Judgment and Breach of Contract. ACC and CCC argue that they were not notified by the Plaintiffs until 2003.

The parties also disagree as to whether notice was late under the terms of the insurance policies. This issue calls upon us to interpret the policies. A contract for insurance is subject to the same rules of interpretation as other contracts. The Plaintiffs argue that none of the events triggered a notice obligation under the Policies because there was no notice that an occurrence had taken place. ACC and CCC argue that the evidence reveals that the Plaintiffs knew of the potential liability arising from property damage as early as 1986. ACC and CCC argue that Radio Materials Corporation was actively and increasingly attempting to respond to the continuous or repeated exposure to conditions caused by hazardous wastes dumped into unlined pits at the Attica site for thirty years and did not provide notice until 2003 or, at the earliest, 2000. Assuming that the notice was late, the parties also disagree whether ACC and CCC were prejudiced by the late notice.

Glossary:

Declaratory Judgment is a binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.

Insured is a person who is covered or protected by an insurance policy.

Insurer is one who agrees, by contract, to assume the risk of another's loss and to compensate for that loss.

Plaintiff is the party who brings a civil suit in a court of law.

Summary judgment is the court's entry of judgment without a trial because there is no genuine issue of material fact to be decided by a fact-finder and one party is entitled to judgment as a matter of law.

Court of Appeals opinions are available online at
<http://www.in.gov/judiciary/opinions/appeals.html>

TODAY'S PANEL OF JUDGES

Hon. Edward W. Najam, Jr. (Monroe County) Presiding

- Judge of the Court of Appeals since December 1992

Edward W. Najam, Jr. graduated from the Indiana University High School in Bloomington, where he was raised and still resides. He received his B.A. in political science, with highest distinction, from Indiana University, and his law degree from the Harvard Law School. As an undergraduate he was elected Student Body President, elected to Phi Beta Kappa, and received the Herman B. Wells Senior Recognition Award for academic excellence and campus leadership.

After law school, Judge Najam returned to Bloomington and served as Administrative Assistant to Mayor Frank McCloskey for two years. For the next 18 years, Judge Najam maintained a general civil and trial practice. During that time he served on attorney advisory committees to the United States District Court for the Southern District of Indiana, was a member of the Bloomington Rotary Club, and was a Director and President of the Monroe County YMCA. Governor Evan Bayh appointed him to the Court of Appeals in 1992, and he was retained by the electorate in 1996 and 2006. Since joining the Court, Judge Najam has served on the Indiana Supreme Court Rules Committee and the Supreme Court Judicial Technology and Automation Committee, and he represents the Indiana judiciary on the Indiana Department of Homeland Security Counter-Terrorism and Security Council. In 2001, Judge

Najam co-chaired the first national conference on the institutional role of state intermediate appellate courts, which was attended by judges from twenty-two states.

Judge Najam is the author of "Public School Finance in Indiana: A Critique," published in the Indiana Law Journal, and "Caught in the Middle: The Role of State Intermediate Appellate Courts," published in the Indiana Law Review. As chair of the Appellate Practice Section of the Indiana State Bar Association, Judge Najam initiated "the appellate rules project" that culminated in a complete revision of the Indiana Rules of Appellate Procedure. Judge Najam was a member of the first class of the Indiana Graduate Program For Judges in 1997. He lectures on appellate practice and has recently taught seminars on the rules for the admission of scientific evidence and litigation in public health emergencies. Judge Najam is a member of the American, Indiana, and Monroe County Bar Associations and the ABA Appellate Judges Conference, is a member of the Indiana University School of Law-Bloomington Board of Visitors, is a member of Phi Delta Phi Legal Fraternity, is a Fellow of the Indiana and Indianapolis Bar Foundations, and is an Eagle Scout.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County)

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained by election in 2000. Born in Decatur County, Judge Bailey was raised on the family farm homesteaded by his ancestors over 150 years ago. He earned his B.A. from the University of Indianapolis; his J.D. from Indiana University School of Law at Indianapolis; and his M.B.A. from Indiana Wesleyan University.

Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution Committee. Additionally, he served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center. He is also a certified civil mediator.

Judge Bailey was also the first Chairperson of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. In 2004, Judge Bailey and his First District colleagues received the

Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. In February of 2006, he served as the Distinguished Jurist in Residence at Stetson University College of Law, and in 2007-08, he was the Moderator of the Indianapolis Bar Association's Bar Leader Series. Currently, Judge Bailey is a member of the Supreme Court Committee on Rules of Practice and Procedure and the Judicial Education Committee of the Judicial Conference of Indiana; he again serves on the Board of Managers of the Indiana Judges Association, now as the Appellate District member.

A strong supporter of law-related education, Judge Bailey teaches government classes at the University of Indianapolis. He is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach National Institute of Trial Advocacy programs. He and his wife have two children.

TODAY'S PANEL OF JUDGES

Hon. Elaine B. Brown (Dubois County)

- Judge of the Court of Appeals since May 2008

Elaine B. Brown, was appointed to the Court of Appeals by Gov. Mitch Daniels and took her seat on May 5, 2008. A native of Ferdinand, Judge Brown has lived her entire life in southern Indiana. She is the mother of two adult children.

Before joining the Court of Appeals, Judge Brown was a trial court judge for 15 years, as well as an attorney in private practice. She served as judge of the Dubois Superior Court from 2005 to 2008 and from 1987 to 1998. In the years between her tenure on the bench, she maintained a solo practice in Jasper and was a senior attorney with Fine & Hatfield in Evansville. Earlier in the 1980s, she practiced law with the firm of Thom & DeMotte in Jasper.

Judge Brown was salutatorian of the class of 1972 at Forest Park High School in Ferdinand. She earned a bachelors degree with distinction from Indiana University in 1976, and her J.D. from the IU School of Law in Bloomington in 1982. She was a teacher in the Greater Jasper Consolidated School Corporation for three years before she entered law school, teaching fine arts to students in grades K through 12.

A large part of Judge Brown's professional focus during her years on the bench has been a commitment to improving the lives of the citizens of Dubois County by addressing substance abuse issues of both individuals and families. In 2007, she initiated a new countywide alcohol and drug program and administered it through the Superior Court, a program similar to the Dubois Court Alcohol and Drug Services Program, for which she was president from 1987 to 1992. In 2005, she created the county's Drug Court. From 2006 until her elevation to the Court of Appeals, she also served as president of the Dubois County Substance Abuse Council; for eight years in the 1990s, she served on the executive board of the Dubois Substance Abuse Task Force. In 1997 and 1998, she volunteered with the Dubois County Reach-Out Suicide Prevention Committee. And from 1989 to 1990, she served on the Committee for a Drug Free Jasper.

Since 1998, Judge Brown has been an

Indiana Registered Civil Mediator with advanced training. She graduated from the Indiana Judicial College in 1996. She served for two years on the Board of Directors of the Indiana Judicial Conference and for two years on the Board of Managers of the Indiana Judges Association. She is a former member of the Indiana Supreme Court Character and Fitness Committee as well as the Judicial Administration Committee of the Indiana Judicial Conference. Judge Brown is also a member of the National Association of Women Judges, the American Judges Association, and the Indiana Council of Juvenile and Family Court Judges.

Judge Brown was active as leader in the Brook Inns of Court in Evansville and was an officer for four years of the Dubois County Bar Association, serving as president in 1985. She is a member of the American Judicature Society, the American Trial Lawyers Association, and holds or has held memberships in the American, Indiana State, Dubois County and Evansville bar associations. She served on the Family Law Study Committee of the Evansville Bar Association when she practiced law in that city. Judge Brown has also been appointed to the Judicial System Improvement Committee of the Indiana State Bar Association.

Among her various community activities, she served on the Scott School Improvement Committee and the North High School PTSA Executive Board. She supported the Restore Old Jasper Action Committee and the Dubois County Museum and is a life member of the Ferdinand Community Center. She is a member of the St. Thomas More Society. A 1993 graduate of the Richard G. Lugar Excellence in Public Service Series, she served on that organization's Board of Governors from 1993 to 1998. In 1992, Judge Brown received the Outstanding Young Hoosier Award from the Indiana Jaycees, one year after the Jaycees presented her with a Distinguished Service Award. In 1988, Judge Brown was named Dubois County's Outstanding Republican Woman.

ATTORNEYS FOR THE PARTIES



For Appellant, P.R. Mallory et al.:

Paul A. Zevnik

Paul A. Zevnik is a partner in Morgan Lewis's Litigation Practice, resident in the Washington, D.C. and the Los Angeles offices. Mr. Zevnik's principal area of practice is insurance coverage advice and litigation, with an emphasis on environmental, asbestos, toxic tort, and product liability coverage disputes. Mr. Zevnik also has experience in transactions in the insurance, broadcasting, and media businesses, including tax-driven transactions involving IRC §468B trusts and insurance captives, as well as corporate-owned life insurance (COLI).

From 1993 to 2003, Mr. Zevnik founded his own firm, most recently known as Zevnik

Horton LLP. Prior to 1993, he litigated or advised on a variety of commercial disputes, including private and public breach of contract cases, breach of warranty actions involving the sale of complex machinery, and suits against the United States under the Tucker Act.

Mr. Zevnik is admitted to practice in the District of Columbia, California, and Pennsylvania and before the U.S. Supreme Court, the U.S. Tax Court, the U.S. District Court for the District of Columbia, and the U.S. District Court for the Eastern District of Pennsylvania.

For Appellant, P.R. Mallory et al.:

Michael John Miguel

Michael John Miguel is a partner in Morgan Lewis's Litigation Practice. His practice focuses on commercial litigation, including insurance recovery, environmental litigation, antitrust, intellectual property, and toxic tort defense.

Mr. Miguel is a trial attorney, successfully representing clients on a national basis in environmental, insurance, antitrust, intellectual property, and toxic tort litigation matters. He has successfully tried four cases to verdict or judgment in the last two years. He has appeared and argued before

state and federal courts in 12 different states and has tried cases in 5 different states.

Mr. Miguel also represents and counsels clients in insurance and environmental matters involving allegations of property damage, bodily injury and damage to the environment as a result of current or former operations.

Mr. Miguel is admitted to practice in California, the District of Columbia, and Massachusetts.

For Appellee, American Casualty Company et al.:

Patrick F. Hofer

Mr. Hofer is a litigation partner with the Washington, D.C., office of Troutman Sanders LLP. He is a 1986 graduate of the University of Virginia School of Law. He is admitted to the bars of the District of Columbia and Virginia. Prior to joining Troutman Sanders in 2006, Mr. Hofer was Deputy Assistant Attorney General, U.S. Department of Justice. From 1987 to 2003 Mr. Hofer was a litigation partner and associate with the Washington, D.C. law firm of Hogan & Hartson, LLP.

Mr. Hofer regularly represents insurance clients in federal and state courts throughout the

country. He has briefed or argued cases before the Supreme Court of California, the Supreme Court of Illinois, the Supreme Court of Ohio, United States Courts of Appeals for the Sixth and Second Circuits, and many lower courts.

Mr. Hofer's most recent publication is "Corporate Succession and Insurance Rights after *Henkel*: A Return to Common Sense," 42 Tort, Trial and Insurance Practice L.J. 763 (2007). He is active as a leader in Boy Scouts and is a director of a non-profit social service organization. He and his wife have three children.